UNITED PRIME CORP. BHD.

v.

Q-BUILT CONSTRUCTION (M) SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C 2049 OF 1985]
25 NOVEMBER 1986

CIVIL PROCEDURE: *Appeal against decision of Senior Assistant Registrar granting interlocutory judgment to plaintiff against defendants - Equipment lease agreement - Rents - Default - Guarantee - Whether proper demand made against guarantors - Amounts in letter and statement of claim inconsistent - Whether order of the Registrar should be set aside.*

This is an appeal by the defendants against the decision of the Senior Assistant Registrar given on 15 May 1986 granting interlocutory judgment against the defendants for damages to be assessed. The plaintiff's claim against the defendants was for a sum of RM1,100,285.75 and interest at 0.065% per day from 20 April 1985 till the date of realisation.

On 25 June 1984 the plaintiff entered into an equipment lease agreement with the 1st defendant in respect of certain goods. In para. 3 of their statement of claim the plaintiff referred to the terms of the said agreement relating to the mode of payment of the rents and the interest rate. It further stated that in the event of any default by the 1st defendant, the plaintiff should have the right to declare a part of or the entire amount of the total amount of the rent for the whole period of the term of the lease.

In para. 4 of the statement of claim, the plaintiff stated that by the guarantee and indemnity dated 25 June 1984 the 2nd 3rd and 4th defendants guaranteed the payment to the plaintiff of all sums due by the 1st defendant under the said agreement and to indemnify the plaintiff against all losses, expenses, charges and damages suffered by the plaintiff in consequence of any failure by the 1st defendant to perform any of the obligations under the said agreement.

In para. 5 the plaintiff stated that the 1st defendant failed to pay the plaintiff the rents due from October 1984 and was therefore in breach of the said Agreement.

In para. 6, the plaintiff averred that pursuant to Article 17 of the said agreement, their solicitors by a letter dated 5 April 1985 demanded the sum of RM1,100,285.75 from the defendants which sum was due and owing.

Held:

[1] The Senior Assistant Registrar had acted wrongly in entering judgment in favour of the plaintiff on the basis of the letter. The amount stated in the letter and in the statement of claim is inconsistent with what was provided in the said lease agreement.

[2] Under Article 17(1)(c) the plaintiff should demand the full amount of the agreed loss value, which is RM1,197,141.

[3] The letter did not constitute a proper demand against the guarantors, namely the 2nd, 3rd and 4th defendants. The letter did not tell the other defendants what the demand was about or what document the plaintiff were relying upon. The letter was also silent as to what amount of payment the other defendants had to make.

[Appeal allowed with costs. Order of Senior Assistant Registrar set aside.]

Case referred to:
Dow Banking Corporation v. Mahnakh Spinning & Weaving Corporation & Bank Mellat [1983] 2 Lloyd's LR 561

Legislation referred to:
Rules of the High Court 1980, O. 14

For the defendants/appellants - M/s. Skrine & Co.
For the plaintiff/respondent - M/s. Mah-kok & Din

JUDGMENT

Zakaria Yatim J:

This is an appeal against the decision of the Senior Assistant Registrar given on 15 May 1986 granting interlocutory judgment against the defendants for damages to be assessed.

The plaintiff's claim against the defendants is for a sum of RM1,100,285.75 and interest at 0.065% per day from 20 April 1985 till the date of realisation. It is not in dispute that on 25 June 1984, the plaintiff entered into an equipment lease agreement (hereinafter referred to as "the said agreement") with the first defendant in respect of certain goods. In para. 3 of their statement of claim the plaintiff referred to the terms of the said agreement relating to the mode of payment of the rents and the interest rate. In the same paragraph, the plaintiff stated that, in the event of any default by the first defendant, the plaintiff should have the right to declare a part of or the entire amount of the total amount of the rent for the whole period of the term of the lease. In para. 4 of the statement of claim, the plaintiff stated that by a guarantee and indemnity dated 25 June 1984, the second, third and fourth defendants guaranteed the payment to the plaintiff to all sums due by the first defendant under the said agreement and to indemnify the plaintiff against all losses, expenses, charges and damages suffered by the plaintiff in consequence of any failure by the first defendant to perform any of the obligations under the said agreement. In para. 5 the plaintiff stated that the first defendant failed to pay the plaintiff the rents due from October 1984 and was, therefore, in breach of the said agreement. In para. 6, the plaintiff averred that pursuant to Article 17 of the said agreement, their solicitors by a letter dated 5 April 1985 demanded the sum of RM1,100,285.75 from the defendants which sum was still due and owing.

The application before the Senior Assistant Registrar was for summary judgment under O. 14 of the Rules of the High Court 1980. Attached to the affidavit in support of that application was a letter written by the plaintiff's solicitors to the first defendant with carbon copies to the other defendants. The content of the said letter is reproduced below:

> 5 April 1985.
>
> Tuan-tuan
>
> **Re: United Prime Corporation Berhad**
> **Lease Agreement No.84-10181.**
>
> We act for the above client.
>
> 2. We refer to our letter dated 15 January 1985 whereby we demanded the sum of RM108,831 being arrears in respect of the above lease agreement. You have failed to pay the said sums within seven days from 15 January 1985 or at all.
>
> 3. By virtue of Article 17 of the said lease agreement, our client **now terminate** the said agreement and demand from you the sum of RM1,100,285.75, particulars which are computed below:

Total rent outstanding (31*RM36,277)	RM	1,124,587
Add: Interest on arrears of rent from July 84 till October 84	RM	4,265.00
Interest on arrears of rent from November 84 till March 85 (as at 31 March 1985)	RM	7,710.75
Less: Prepaid rent	RM	36,277.00
	RM	1,100,285.75

4. Take Notice that you are required to pay us the aforesaid sum within fourteen (14) days from the date hereof, failing which our instructions are to commence legal proceedings against you forth with.

Yang benar.

Sgd/-

Q-Built Construction (M) Sdn. Bhd.
Wisma Q-Built,
149-151, Jalan Maharajalela,
Kuala Lumpur.

c.c. (1) Ordinary Post.
(2) Tan Sri Dato' Taib Bin Haji Andak) This is
(3) Ch'ng Poh) a demand
(4) Kamaruddin bin Tan Sri Dato' Taib) upon you
(5) Client - (Ref: 84-10181).
[Emphasis added].

The above letter was written in accordance with the provisions of Article 17 of the said lease agreement. The article states:

Article 17. (Default)

(1) If the Lessee fails to pay the Rent provided for in Article 3 hereof after the same becomes due and payable or any other sums and monies due and payable under this Lease Agreement or if the Lessee fails to observe or perform all and any provision of this Lease Agreement or **if the Lessor shall on any reasonable ground consider itself insecure** the Lessor shall without prejudice to any pre-existing liability of the Lessee to **the Lessor have the right of forthwith to exercise all or any of the following remedies without having** to give any prior notice or demand to the Lessee:

(a) to **declare a part** of or the entire amount of the total amount of the rent for the whole period of the Initial Term payable under this Lease Agreement and all other moneys, sums, costs and expenses under this Lease Agreement immediately due and payable by the Lessee;

(b) to **take possession** of the Equipment or demand its return;

(c) to **terminate the lease** hereby created and to demand from the Lessee the full amount of the Agreed Loss Value and in addition thereto to claim from the Lessee for compensation for all loss and damages including but not limited to loss of profits.

(2) Even if any of the remedies provided for in sub-paragraphs (a) and (b) of the para. (1) of this Article have been taken by the Lessor, the Lessee shall not be relieved from any other liability under this Lease Agreement including but not limited to liability for damages. [Emphasis added].

The said letter was written in pursuance of Article 17(1)(c), that is, termination of the lease agreement. But the question of the termination of the said lease agreement was not pleaded in the statement of claim. Mr. Goon, Counsel for the plaintiff conceded that the question of termination was not indicated in the pleadings. Indeed what was pleaded was the provision of Article 17(1)(a), which states that the plaintiff had the right to declare a part of or the entire amount of the total amount of the rent payable under the said lease agreement. It was not in dispute that no declaration was in fact made under Article 17(1)(a).

In my opinion, the Senior Assistant Registrar had acted wrongly in entering judgment in favour of the plaintiff on the basis of the letter. Even if termination of the said lease agreement had been pleaded in the statement of claim, the amount stated in the letter and in the statement of claim is inconsistent with what was provided in the said lease agreement. Under Article 17(1)(c), the plaintiff should demand the full amount of the agreed loss value. According to item 9 of the schedule to the said lease agreement, the amount of the agreed loss value for the first year was RM1,197,141 whereas the amount stated in the statement of claim was RM1,100,285.75.

I should add here that the said letter did not constitute a proper demand against the guarantors, namely the second, third and fourth defendants. The letter was not addressed to them. They were given only carbon copies and against their names, the solicitors for the plaintiff wrote "This is a demand upon you." The letter did not tell the other defendants what the demand was about or what document the plaintiff were relying upon. The letter was also silent as to what amount of payment the other defendants had to make. In order to give the contract of guarantee business efficacy, the said letter must state clearly what the guarantors were required to pay. See *Dow Banking Corporation v. Mahnakh Spinning & Weaving Corporation & Bank Mellat* [1983] 2 Lloyd's LR 561 @ 566.

Apart from the said letter, which did not constitute a proper demand against the second, third and fourth defendants, there was no demand made by the plaintiff to the defendants.

For the reasons stated above, I allow the appeal with costs and set aside the order of the Senior Assistant Registrar dated 15 May 1986.

Also found at [1987] 1 CLJ 501